

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



74-1646

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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PAN AMERICAN WORLD AIRWAYS, INC.,  
and TRANS WORLD AIRLINES, INC.,

*Petitioners,*

—against—

CIVIL AERONAUTICS BOARD,

*Respondent.*

ON PETITION FOR REVIEW OF ORDER OF THE CIVIL  
AERONAUTICS BOARD

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**BRIEF FOR PETITIONERS**

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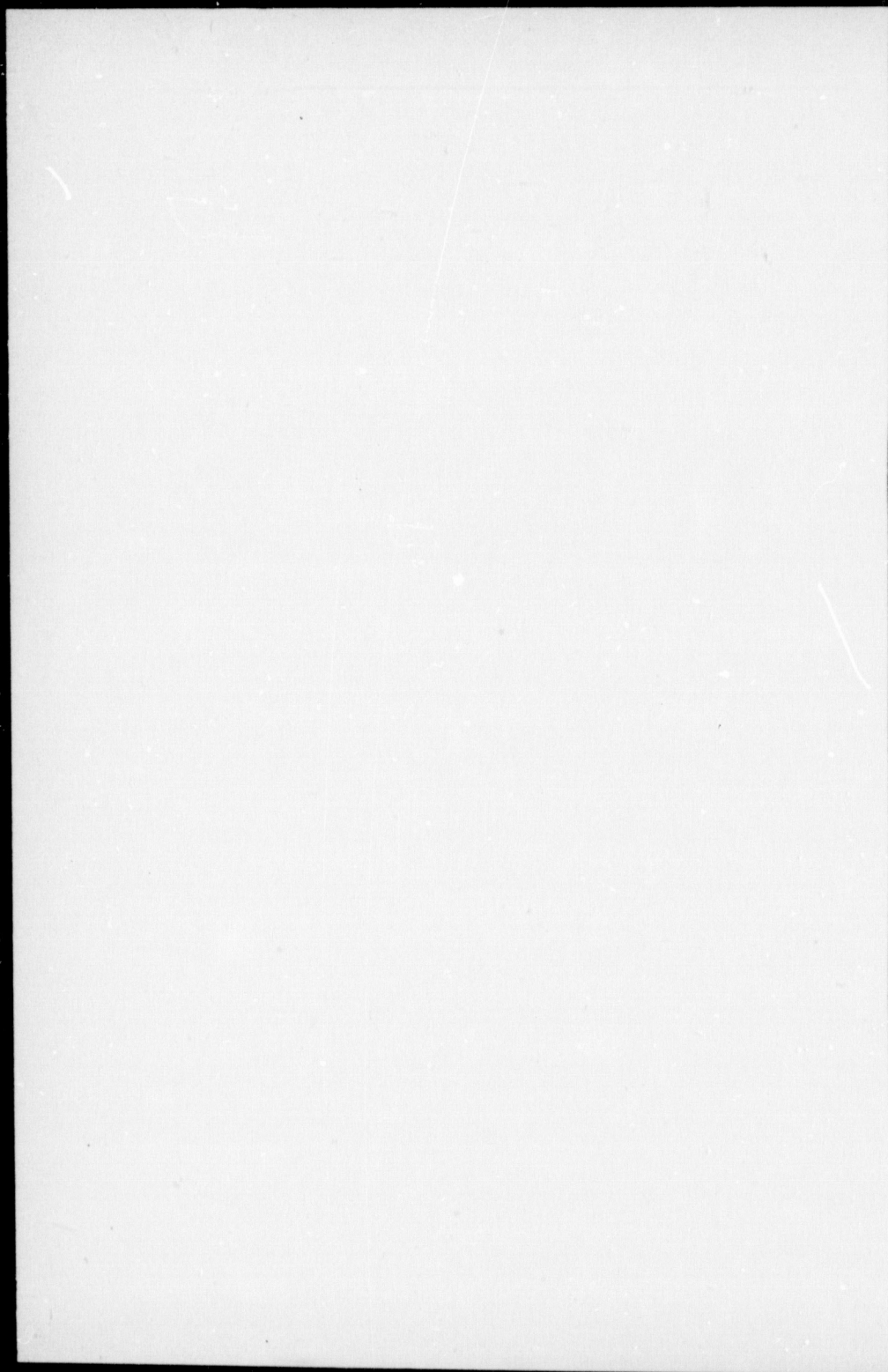
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ON PETITION FOR REVIEW OF ORDER OF THE CIVIL  
AERONAUTICS BOARD

**BRIEF FOR PETITIONERS**

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**The Issue Presented for Review**

1. Whether the Civil Aeronautics Board by the adoption of Regulation SPR-74 authorizing U.S. supplemental air carriers and foreign charter air carriers to perform foreign-originating "travel group charters" ("TGCs") has in effect authorized such carriers to sell air transportation to the general public on an individually ticketed basis, which does not constitute the sale of "charter trips," and has thus exceeded its statutory authority under §§101(34) and 401(d)(3) and 402(b) of the Federal Aviation Act of 1958.

## Statement of the Case

### A. Nature of the Case

Petitioners are scheduled airlines of the United States. They are authorized to engage in interstate and foreign air transportation on both a scheduled and charter basis.

Petitioners seek review of an order and regulation adopted by the Civil Aeronautics Board (the "Board") permitting U.S. supplemental and foreign charter carriers to perform foreign-originating TGCs in the manner set forth in such order and regulation, which differs radically from that presently prescribed by Part 372a of the Board's regulations for TGCs generally.

Authority to operate such foreign-originating TGCs amounts to authority to carry individually ticketed passengers. Since U.S. supplemental and foreign charter carriers are licensed to engage only in *bona fide* charter operations, the order under review is beyond the Board's power under the Federal Aviation Act (the "Act"). The Act requires the Board to preserve the distinction between charter and individually ticketed services.

### B. The Course of the Proceedings Below

By notice dated September 24, 1973 (SPDR-33) (Tr. 1-16),\* the Board called for comment upon its proposal to permit the operation of foreign-originating TGCs.

Following the receipt of comments (Tr. 17-65), the Board on March 15, 1974 adopted Regulation SPR-74 (Tr. 66-91) authorizing all direct air carriers to operate foreign-originating travel group or advance booking charters (referred

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\* Tr. references are to the pages of the "record" below, an index of which has been certified by the Board to this Court. Unless otherwise indicated, emphasis is supplied.

to by the Board as TGC/ABC) in compliance with the applicable rules of the originating country, so long as (1) such foreign rules conform to §372a.60(b) of the Board's regulations, and (2) there is in effect a formal agreement between the originating country and the United States with respect to the charterworthiness of such operations.

### ***C. The Statutory Provisions Involved***

Under the Act U.S. supplemental air carriers may engage only in "supplemental air transportation." §401(d)(3), 49 U.S.C. §1371(d)(3).

"Supplemental air transportation" is defined as "charter trips, including inclusive tour charter trips, in air transportation . . . to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to Sections 401(d)(1) and (2) of this Act." §101(34), 49 U.S.C. §1301(34).

As hereinafter demonstrated the foreign-originating TGCs which the Board would now authorize are neither "charter trips in air transportation," nor "inclusive tour charter trips." Furthermore, such foreign-originating TGCs do not "supplement the scheduled service" of petitioners or other regular route carriers. Instead, the Board has here authorized U.S. supplemental and foreign-charter carriers to engage in individually ticketed point-to-point competition with the scheduled airlines.

### ***D. Statement of Facts***

#### **1. The Board's Interpretation of "Charter Trips"**

In July 1962 Congress enacted Public Law 87-528, 76 Stat. 143 amending the Act by empowering the Board to grant certificates of public convenience and necessity to U.S. supplemental air carriers. Under the 1962 legislation

the supplemental air carriers were expressly limited to engaging in "charter trips, in air transportation . . . to supplement the scheduled service" of the regular route carriers."

Since 1962 the Board has consistently eroded the meaning of the term "charter" as employed by Congress in limiting the authority of the U.S. supplemental carriers to engage in air transportation.

In 1964 the Board authorized the concept of "split charters," ER-408, 29 F.R. 6005, "the process whereby each of two unrelated but qualified charter groups with similar destinations charter one half of the same aircraft."\* The Board's action authorizing "split charters" was upheld in *American Airlines, Inc. v. CAB*, 348 F.2d 439 (D.C. Cir. 1965) [hereinafter *American Airlines I*].

In 1966 the Board empowered the U.S. supplemental carriers to conduct "inclusive tour charters," "a kind of all-expense paid tour, with restrictions such as a seven day minimum between departure and return, a minimum of three stops, and a requirement that the tour package price be no less than 110 percent of the lowest available fare charged by the scheduled air carriers for comparable individually ticketed travel."\*\*

The Board's "inclusive tour" authorization with respect to domestic air transportation was upheld by the Court of Appeals for the District of Columbia Circuit in *American Airlines, Inc. v. CAB*, 365 F.2d 939 (1966) [hereinafter *American Airlines II*].

Thereafter this Court held that, with respect to "inclusive tours" in international and foreign air transportation, the

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\* *Saturn Airways, Inc. v. Civil Aeronautics Board*, 483 F.2d 1284, 1288 (D.C.Cir. 1973).

\*\* *Saturn Airways, Inc.*, *supra* at 1289.

Board had exceeded its powers. *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (1967).

When the holding of this Court in *Pan American* was subsequently affirmed by an equally divided court *sub nom. World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968), the Board sought and obtained authority to permit the supplementals to conduct "inclusive tour charters." Act of September 26, 1968, Public Law 90-514, 82 Stat. 867. The purpose of the 1968 legislation, which merely authorized "inclusive tour charters", "was to 'clarify' rather than add to the authority of the Board as originally granted in the 1962 legislation", *Saturn Airways, Inc., supra*, at 1291.

The next step in the erosion process occurred on September 27, 1972, when the Board authorized U.S. supplemental and foreign charter carriers, along with the scheduled airlines, to conduct so-called "travel group charters" (TGCs), "a new type of charter in air transportation . . . somewhat revolutionary in concept . . . [relying] upon travel factors rather than non-travel affinity to distinguish the charters from individually ticketed travel. . . ." \*

The Board's TGC regulations were upheld in *Saturn Airways, Inc., supra*, on July 11, 1973. In so ruling, the United States Court of Appeals for the District of Columbia stated:

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\* *Saturn Airways, Inc., supra* at 1286. Still further erosion of the meaning of "charter trips" appears imminent. By Notice of Proposed Rule Making dated March 15, 1974 (SPDR-35, 39 F.R. 10915), the Board currently has under consideration proposed changes in its TGC regulations which would reduce from 90 to 60 days prior to scheduled departure the deadline for making reservations, and which would permit the "assignment" of 15% of such reservations to members of the general public at any time. If such changes are effected, they will be applied to foreign-originating TGCs as well (Tr. 67, fn. 3a).

"An elaboration of the intricacies of the TGC regulations would serve little purpose. We have studied them carefully and find that they maintain the necessary distinction between group and individually ticketed travel, and that they are the result of painstaking and reasoned analysis by the Board. We are impressed with the five 'substantial and vital' differences between TGCs and conventional travel that have been stressed by the Board in its argument before us: (1) *The TGC traveler is a party to the charter contract itself, incurring liability for the pro rata share of the charter cost and running the risk that his cost may increase depending upon the load factor ultimately achieved.* (2) *The travel group must be formed no less than three months prior to the scheduled departure time, or the trip must be cancelled.* (3) *The members of the group formed in #2 above must have paid a deposit of 25 percent of the minimum pro rata charter price before the time for filing the list of tour members with the Board has elapsed, no more than four nor less than three months prior to the scheduled departure. This deposit is, subject to certain exceptions, nonrefundable. Payment of the balance must then be made not later than two months before departure. As of then the participant risks, again subject to certain exceptions, a 100 percent forfeiture should he desire to change his plans.* (4) *There is a risk of cancellation of the flight up to 45 days prior to scheduled departure because of defaults by fellow charter participants.* (5) *All TGC participants must go and return as a group, subject to predetermined, fixed restrictions as to the length of the trip.*" 483 F.2d at 1292.\*

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\* As hereinafter delineated, "differences" (1), (3) and (4), italicized above, have been eliminated by the Board in its foreign-originating TGC regulations. Of the "differences" which impressed the *Saturn* Court, only (2) and (5) remain in effect.

## 2. The Board's Foreign-Originating TGC Regulations

The Board's foreign-originating TGC regulations are set forth in the Appendix (Tr. 84-91).

Under these regulations any passenger may purchase a ticket for point-to-point round trip air transportation provided only: (1) he becomes "contractually bound" to pay for his ticket at least ninety (90) days prior to flight departure (Tr. 89), and (2) he accepts a minimum stay of 14 days during the peak traffic season (Tr. 90).\*

The sale of TGCs under these regulations cannot be distinguished in any significant respect from the sale of individually ticketed transportation to members of the general public. The "requirements" specified in such regulations are clearly not sufficient to provide any practical basis for differentiation between the sale of individually ticketed transportation and the sale of charter transportation. In fact, these two "requirements" are all that is left of all the differences between TGCs and conventional travel which the United States Court of Appeals for the District of Columbia Circuit in *Saturn Airways, Inc.*, *supra*, found taken together to be "substantial and vital". Absent from the foreign-originating TGCs are *three* of the five factors which that Court held served to differentiate TGCs from individually ticketed transportation, *i.e.*,

"1. The TGC traveler is not required to be 'a party to the charter contract itself, incurring liability for the pro rata share of the charter cost and running the risk that his cost may increase depending on the load factor ultimately achieved.'

"3. The members of the group are not required to have paid a deposit of 25 percent of the minimum

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\* Where the cost of the TGC/ABC is prorated the minimum stay need only be 10 days (Tr. 90).

pro rata charter price before the time for filing of the list of tour members has elapsed, and any deposit which might be made is not required to be non-refundable. Payment of any balance is not required to be made in any particular time frame. The participant does not necessarily risk any forfeiture—let alone 100 percent—should he desire to change his plans.

"4. There is no risk of cancellation at all because of defaults by fellow charter passengers, because the tour operator can bear the risk."

Thus, the Board now says that three-fifths of the "substantial and vital" TGC restrictions are neither substantial nor vital for a major portion of the air transportation markets.\*

## I.

**The Civil Aeronautics Board exceeded its statutory power in authorizing the supplemental and foreign charter only carriers to conduct foreign-originating travel group charters.**

### ***A. Foreign-Originating TGCs are not "Charter Trips in Air Transportation"***

While the Act contains no specific definition of "charter" and makes no reference to TGCs or foreign-originating TGCs, the legislative history behind Public Laws 87-528 and 90-514 evidences a clear Congressional intention to maintain the integrity of the traditional charter concept so as to preserve the distinction between individually

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\* Foreign origin travel accounts for the majority of some international markets, such as that between the United States and South America, and is growing at a more rapid rate than U.S. origin travel in many others.

ticketed travel and to prohibit charters from being solicited, either directly or indirectly, from the general public.

Foreign-originating TGCs make no pretense of maintaining the integrity of the traditional charter concept in air transportation. Furthermore, foreign-originating TGCs are solicited directly from the general public.

The legislative history of Public Law 87 528 was explored in depth by this Court in *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (1967), *aff'd per curiam* by an equally divided court *sub nom. World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968).

This history had previously been reviewed by the United States Court of Appeals for the District of Columbia Circuit in *American Airlines I and II*, *supra*.

While both Courts agreed "that a prime concern of Congress was to maintain the integrity of the charter concept—to preserve the distinction between group and individually ticketed travel",\* this Court in *Pan American World Airways, Inc.*, *supra*, reached a contrary conclusion to that of the United States Court of Appeals for the District of Columbia Circuit in *American Airlines II*.

Whereas the District of Columbia Court was of the view that the Board's "inclusive tour charter" regulations maintained the important distinction between group and individually ticketed travel, and accordingly upheld the Board's action, this Court reached a contrary conclusion, stating:

"We . . . reject the argument that the legislators' concern was with abuses growing out of the Board's prior practice of allowing supplemental carriers to

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\* 380 F.2d at 779.

perform limited scheduled individually ticketed travel. Regardless of the extent to which there may have been legislative concern based on this prior experience, indeed whether or not the expression of concern was misguided or wholly unwarranted, it was in fact manifested in a congressional declaration binding on both the Board and this court, that was clearly intended to forbid the Board to authorize inclusive tours." 380 F.2d at 781.

The basic difference in the approach of the two courts to the consideration of the legislative history of Public Law 87-528, is that this Court found significant in its consideration

"[s]tatements made by the floor managers that fully explain the changes in the bill. These floor managers were members of the legislative committees that held extensive hearings and were responsible for formulating the legislation."<sup>14</sup>

<sup>14</sup> For example, Representative Harris was the Chairman of the House Committee on Interstate and Foreign Commerce, Representative Williams was Chairman of the Subcommittee on Transportation and Aeronautics of which Representative Collier was a member, Senator McNerney was chairman of the Subcommittee on Aviation, Senators Thurmond, Cotton, Morton and Scott were on that committee." 380 F.2d at 782.

#### *Why the Act Does Not Define "Charter"*

In particular, this Court explored in depth *the reason why the Act contains no definition of "charter."* The reason why the Act contains no definition of "charter" is that Congress deemed it important that the Civil Aeronautics Board have flexibility to guard against any subterfuges that might emerge in order to insure "that charter serve

its planeload service concept and is not employed as a subterfuge to perform individually ticketed services." \*

This Court found significant the following statement read by Representative Harris, identical to one submitted later by Representative Collier:

"The bill, as reported by the conference committee, contains no definition of charter. The law is well established that, in air transportation, charter means essentially the lease of the ~~entire~~ capacity of an aircraft for a period of time or a ~~particular~~ trip, for the transportation of cargo or persons and baggage, on a basis which does not include solicitation of the general public, or any device where individually ticketed services would be offered or performed under guise of charter. The basic concept being thus clear, it is important that the Civil Aeronautics Board, by regulation and other appropriate measures, make sure that charter serves its planeload service concept and is not employed as a subterfuge to perform individually ticketed services. Manifestly, the nature of such subterfuge may change from time to time, and the regulatory agency needs some flexibility to modify its regulations to guard against any new subterfuges that may emerge. For this reason, the House committee objected to any attempt to freeze into the act a definition of charter service which would prevent the Board from dealing effectively with abuses. *Thus the bill, as passed by the House, contained no definition of charter.*" 380 F.2d at 780.

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\* 108 Cong.Rec. 12322 (June 29, 1962), Statement of Representative Harris, Chairman of the House Interstate Commerce Committee.

*Why Foreign-Originating TGCs Are Not Charters*

The Board's new foreign-originating TGCs do not involve "the lease of the entire capacity of an aircraft . . . on a basis which does *not* include solicitation of the general public." Instead, under guise of charter, individually ticketed services are being sold to the general public.

The District of Columbia Court in *Saturn Airways, Inc., supra*, did not elaborate as to why it viewed regular TGCs as constituting "charter trips" under the Act. Eschewing this Court's reading of the legislative history of the Act in *Pan American, supra*, the United States Court of Appeals for the District of Columbia Circuit merely stated that "We adhere to the analysis and conclusions of our *American Airlines II* decision," noting that it was "impressed with the five 'substantial and vital' differences between TGCs and conventional travel stressed by the Board in its argument," 483 F.2d at 1291 and 1292.

Under the foreign-originating TGCs, however, three of these "substantial and vital" differences are now eliminated. Only two alleged such differences remain, *i.e.*:

"(2) The travel group must be formed no less than three months prior to the scheduled departure time, or the trip must be cancelled;

"(5) All TGC participants must go and return as a group, subject to predetermined, fixed restrictions as to the length of the trip." 483 F.2d at 1292.

But the requirement that a travel group of 40 persons be assembled from the general public 90 days in advance of departure is not "substantial and vital"—it is meaningless in distinguishing between the sale of individually ticketed scheduled transportation and charters. Surveys available to the Board indicate that over 70% of trans-

atlantic passengers in regular scheduled service plan their trips at least four months in advance of departure.\*

Similarly, the requirement that the TGC participants go and return as a group is no real differentiation from individually ticketed services. A large portion of scheduled service passengers travel in groups in both directions. Group fares for passengers travelling on group-inclusive tours have long been in existence as an essential part of the scheduled carriers' services. And the requirement in foreign-originating TGCs that the passenger accept a minimum stay of 14 days during the peak traffic season, *supra*, p. 7, does not distinguish such "charters" from individually ticketed services. The great bulk of transatlantic passengers remain abroad for such a period. Indeed, transatlantic scheduled excursion fares, which account for a substantial portion of transatlantic air travel, demand such a stay.

Whereas Congress clearly intended to maintain the integrity of the traditional charter concept, i.e. "the lease of the entire capacity of an aircraft . . . on a basis which does not include solicitation of the general public,"\*\* the Board in its foreign-originating TGC regulations now authorizes U.S. supplemental and foreign charter air carriers to solicit the general public to buy round trip air transportation on their lines provided they make their reservations three months in advance (25a, Tr. 89), and accept a minimum stay of 14 days during the peak traffic season (26a, Tr. 90).

It is obvious that these two requirements do not maintain the integrity of the traditional charter concept in air

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\* See, e.g., "Study of Charter Passengers," Louis Harris and Associates, Inc., C.A.B. Docket 21255, indicating that 74% of Pan American's passengers had decided on their specific flights at least four months in advance.

\*\* 108 Cong. Rec. 12322 (June 29, 1962).

transportation. The Board, in its foreign-originating TGC regulations has so far eroded the meaning of charter that even the District of Columbia Court—let alone Congress—would not recognize it. Plainly here “the indistinct line between group (charter) and individually ticketed travel has been crossed.” *Saturn Airways, Inc. v. Civil Aeronautics Board*, 483 F.2d 1284, 1288 (D.C. Cir. 1973).

**B. Foreign-Originating TGCs do not Supplement the Scheduled Service of Petitioners**

Under the Act, the Board may authorize the U.S. supplemental air carriers to operate “charter trips” only when such trips “supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to §§401(d)(1) and (2) of this Act.” §§101(34), 49 U.S.C. §1301(34).

“[T]he services of supplemental air carriers are intended to supplement those of the scheduled air carriers.” *Pan American World Airway, Inc. v. Civil Aeronautics Board*, *supra* at 772.

The U.S. Court of Appeals for the District of Columbia Circuit in *Saturn Airways, Inc.*, *supra*, expressly recognized that the “charter trips” of the U.S. supplemental air carriers must “supplement the scheduled service” of the scheduled or trunkline carriers saying:

“The supplemental air carriers, once known as ‘non-scheduled’ or ‘irregular’ air carriers, are meant to provide a supplementary service to that of the scheduled or trunkline carriers, who offer individually ticketed, regularly scheduled service to the general public. Since the supplementals are not subject to the economic rigors attendant upon a regularly scheduled, individually ticketed service, for they essentially fly when they

desire and nearly always carry a full planeload of passengers, the air fares for comparable routes on charter flights can be significantly less than those offered by the scheduled air carriers. Congress in providing for certification of the supplementals recognized the potential problem of competition and the real possibility that *if not carefully controlled they would supplant, rather than supplement*, the regularly scheduled service." 483 F.2d at 1287, (footnotes omitted).

The District of Columbia Court further noted that:

"Individually ticketed, regularly scheduled service is the mainstay of an efficient air transportation system, and a critical necessity in any sophisticated economy. Congress realized that it must be preserved. Accordingly, the legislative history and language of the statute itself manifest a congressional intent that although the Board should have the power of definition, it should never permit 'individually ticketed service to be offered to the general public under the guise of charter.' Sen. Rep. No. 688, 87th Cong., 1st Sess. 13 (1961)" 483 F.2d at 1287-1288, (footnotes omitted).

The Board's foreign-originating TGC regulations authorize the U. S. supplemental carriers to compete directly with the scheduled or trunkline carriers for point-to-point round trip air transportation. The only limits to such competition is that the passenger buying a ticket of a supplemental air carrier must accept a 14 day stay during the peak traffic season (26a, Tr. 90) and become "contractually bound" to pay for his ticket 90 days prior to flight departure (25a, Tr. 89).

Such an operation does not "supplement" petitioners' scheduled services. Instead it competes directly with peti-

tioners' scheduled services. Furthermore "since the supplementals are not subject to the economic rigors attendant upon a regularly scheduled, individually ticketed service, for they essentially fly when they desire and nearly always carry a full planeload of passengers," petitioners "are admittedly at an economic disadvantage" in such competition. *Saturn Airways, Inc., supra*, at 1287.

It is manifest that Congress did not envision that the Board would sanction such an operation by the supplementals. Congress directed that the Board assure that the service of the supplementals "be limited to supplemental air transportation as defined in [the] Act." §401(d)(3), 49 U.S.C. §1371(d)(3). Congress intended that the authority of the supplementals to engage in air transportation be limited to "charter trips, including inclusive tour charter trips, in air transportation" and that such charter trips were "to supplement the scheduled service" of the regular route carriers. §101(34), 49 U.S.C. §1301(34).

The Board's grant of foreign-originating TGC authority to the supplementals violates the limitations of the Act. The Board may not adopt a definition of "charter" or "supplemental" "that contravenes basic policies laid down in the Act. To permit the selling of individual tickets to the general public in direct competition with the regularly scheduled airlines, regardless of whether such selling is done through the medium of a travel agent who has first 'chartered' the plane, does violate basic policies of the Act." *Pan American World Airways, Inc., supra*, at 779.

While the Act's definition of supplemental air transportation does not apply to foreign charter carriers, these carriers do not have a right under the Act to perform foreign-originating TGC charters. Since the Board may not legally authorize the U. S. supplemental carriers to

perform this transportation, presumably the Board would not wish to permit the foreign charter carriers to conduct such an operation.

### CONCLUSION

The Board's foreign-originating TGC regulations should be set aside.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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PAN AMERICAN WORLD AIRWAYS, :  
INC. and TRANS WORLD AIRLINES, : CERTIFICATE OF SERVICE  
INC., :

Petitioners, : Index No.  
-against- : 74-1646

CIVIL AERONAUTICS BOARD, :

Respondent. :

- - - - -x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

Harold L. Warner, Jr., being duly sworn, deposes  
and says:

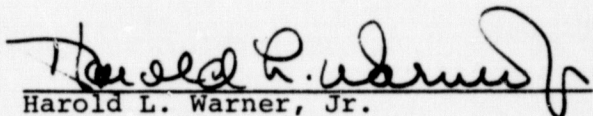
1. I am attorney for petitioners in this case.
2. Pursuant to Rule 25(d) of the Federal Rules  
of Appellate Procedure, I hereby certify that I have  
served on counsel for each party separately represented  
two (2) copies of petitioners' brief and appendix in this  
case, in conformance with Rule 31(b) of the Federal Rules  
of Appellate Procedure, by mailing the same on this 2nd  
day of August, 1974 addressed as follows:

Bruce B. Wilson, Esq.  
Acting Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
Washington, D. C. 20530

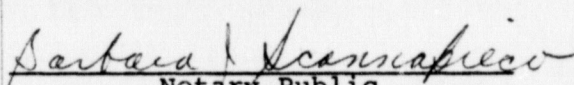
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Subscribed and sworn  
to before me this *2nd*  
day of August, 1974.

  
Notary Public

BARBARA J. SCANNAPIECO  
Notary Public, State of New York  
No. 43-2003050  
Qualified in Richmond County  
Cert. Filed in New York County  
Commission Expires March 30, 1975